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United States

OCTOBER TERM, 1990

LOUISE H. RENNE, CITY ATTORNEY FOR THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Petitioners,
vs.
BOB GEARY, *et al.*,
Respondents.

BRIEF OF AMICI CURIAE CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA LIBERTARIAN PARTY, *ET AL.*, IN SUPPORT OF RESPONDENTS

CEDRIC C. CHAO*
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
JON S. TIGAR
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675
Telephone: (415) 677-7000
* Counsel of Record

Counsel for Amici Curiae

CALIFORNIA DEMOCRATIC PARTY;
PHILLIP ANGELIDES,
Chair, California Democratic Party;
EDMUND G. BROWN, JR.,
Former Chair, California Democratic Party;
CALIFORNIA LIBERTARIAN PARTY;
[Other Amici listed on inside front cover]

CONTINUED LISTING OF AMICI

GAIL LIGHTFOOT, Chair, California Libertarian Party; SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE; CAROLE MIGDEN, Chair, San Francisco County Democratic Central Committee and Member, San Francisco Board of Supervisors; SAN FRANCISCO COUNTY REPUBLICAN CENTRAL COMMITTEE; SAM HARPER, Chair, San Francisco County Republican Central Committee; LOS ANGELES COUNTY DEMOCRATIC CENTRAL COMMITTEE; ROBERT FARRAN, Chair, Los Angeles County Democratic Central Committee; ALAMEDA COUNTY DEMOCRATIC CENTRAL COMMITTEE; LIZ FIGUEROA, Chair, Alameda County Democratic Central Committee; SANTA CLARA COUNTY DEMOCRATIC CENTRAL COMMITTEE; STEPHEN STAMM, Chair, Santa Clara County Democratic Central Committee; MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE; DAVID STRAND, Former Chair, Marin County Democratic Central Committee; SOLANO COUNTY DEMOCRATIC CENTRAL COMMITTEE; RON ARRANTS, Chair, Solano County Democratic Central Committee; PLACER COUNTY DEMOCRATIC CENTRAL COMMITTEE; THOMAS ROMERO, Chair, Placer County Democratic Central Committee; CAROL SHERMAN, Mayor of Fairfax; WENDY BAKER, Councilwoman and Former Mayor of Fairfax; NANCY L. PARENT, Councilwoman and Former Mayor of Pittsburg; EDDIE SOUZA, Mayor of Santa Clara; LAWRENCE E. STONE, Councilman and Former Mayor of Sunnyvale; DENNIS ZANE, Councilman and Former Mayor of Santa Monica; LIBBY DENEBEIM, Member, San Francisco Board of Education; MARY KING, Member, Alameda County Board of Supervisors; NATIONAL COMMITTEE FOR PARTY RENEWAL; NORTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; SOUTHERN CALIFORNIA COMMITTEE FOR PARTY RENEWAL; PROFESSOR EDMOND COSTANTINI; AND PROFESSOR EUGENE C. LEE.

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BRIEF OF AMICI CURIAE CALIFORNIA DEMOCRATIC PARTY AND CALIFORNIA LIBERTARIAN PARTY, ET AL., IN SUPPORT OF RESPONDENTS

INTERESTS OF THE AMICI

The California Democratic Party and its current and immediate past chairs, Philip Angelides and Edmund G. Brown, Jr.; the California Libertarian Party and its chair, Gail Lightfoot; the San Francisco, Los Angeles, Alameda, Santa Clara, Marin, Solano, and Placer County Democratic Central Committees, and the chairs of each of these county central committees; and the San Francisco County Republican Central Committee and its chair, Sam Harper, are interested in preserving and exercising the parties' First Amendment rights

to endorse, support, or oppose candidates running for nonpartisan offices in California.

Carol Sherman, Mayor of Fairfax, Wendy Baker, Councilwoman and former Mayor of Fairfax, Nancy L. Parent, Councilwoman and former Mayor of Pittsburg, Eddie Souza, Mayor of Santa Clara, Lawrence E. Stone, Councilman and former Mayor of Sunnyvale, Dennis Zane, Councilman and former Mayor of Santa Monica, Carole Midgen, member of the San Francisco Board of Supervisors, Mary King, member of the Alameda County Board of Supervisors, and Libby Denebeim, member of the San Francisco Board of Education, are interested in having the right to seek and publicize the endorsements and support of political parties and in promoting responsive local government accountable to the electorate.

The National Committee for Party Renewal and the Northern California and Southern California Committees for Party Renewal are organizations composed of prominent political scientists and political practitioners interested in the rejuvenation of America's political parties. Professors Edmond Costantini and Eugene C. Lee are interested in maintaining the appropriate relationship between political parties and local government.

The Ninth Circuit Court of Appeals granted leave to the above-listed amici to file a brief in support of respondents' Petition for Rehearing and Suggestion for Rehearing En Banc and to participate in the oral argument before the *en banc* court.

Subsequent to the *en banc* court's decision, petitioners moved both the Ninth Circuit and this Court to stay the *en banc* decision. The above-listed amici opposed both motions for stay, which were denied. Consequently, amici political parties were able to, and did, evaluate and endorse candidates running in California's November 1990 nonpartisan elections. On March 15, 1991, amici filed with this court a Motion for Leave to Participate in Oral Argument and For Divided Argument.[1]

SUMMARY OF ARGUMENT

This case concerns the straightforward issue of whether California may permissibly burden the First Amendment free speech and associational rights of California's political parties and their adherents. Article II, section 6(b) of the California Constitution imposes just such a burden by prohibiting political parties from endorsing, supporting, or opposing candidates for nonpartisan office. Myriad decisions of this Court require that where a statute infringes fundamental rights such as free speech, it must be narrowly tailored to achieve a compelling state interest.

Petitioners contend that they are justified in silencing the political parties, primarily relying on asserted interests in the fact and appearance of impartiality in government. Petitioners' argument suffers from an absence of proof: they offer nothing more than speculation to support their claim that without the strictures of section 6(b) in place, endorsements by political parties will significantly erode governmental impartiality. This Court has rejected the notion that a state may preserve the integrity and independence of a group by imposing a ban on what the public may hear. Because section 6(b) does not serve the asserted interest, it must be struck down.

Finally, petitioners cannot demonstrate, as they must, that section 6(b) is the least restrictive means for achieving the end they seek. Petitioners cannot completely foreclose speech based on a naked assertion that nothing less will serve their purpose, where less restrictive measures have not been attempted. Moreover, section 6(b), which targets political

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[1] Pursuant to Supreme Court Rule 37.2, all parties to this action have consented to amici herein filing this brief in support of respondents. The parties' written consent has been submitted to this Court under separate cover.

parties for their ostensible threat to impartiality, is underinclusive, ignoring the greater threat from the hundreds of political clubs, political action committees, politicians, and monied special interest groups in California, with no logical or factual justification for the distinction.

ARGUMENT

I. SECTION 6(b) IS AN EGREGIOUS BURDEN ON FIRST AMENDMENT RIGHTS AND MUST BE SUBJECTED TO THE MOST EXACTING SCRUTINY

A. Section 6(b) Targets Political Speech, Which Lies at the Core of the First Amendment

This Court has consistently emphasized that "legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 50 (1976) (citations omitted). By prohibiting political parties from speaking out on the qualifications of candidates in nonpartisan elections, section 6(b) flies in the face of this precept, forbidding a type of speech which rests "at the core of our electoral process and of the First Amendment freedoms." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1984) (citation omitted).

> We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.

Id. at 223 (citations omitted).

Petitioners' suggestion that speech concerning candidates for *nonpartisan* office merits less protection than speech concerning candidates for partisan office should be firmly rejected. *See id.* ("Free discussion about candidates for public offices is no less critical before a primary than before a general

election"). Regardless of the type of election at issue, a prohibition on endorsements "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues." *Id.*

Indeed, a ban on endorsement in local elections is arguably more injurious to the voters and candidates than it is in national or statewide elections. Local races often involve candidates with little name recognition, and voters, who have little information on which to base their decisions, often welcome the guidance of the party with which they are affiliated. *See Eu* Joint Appendix ("*Eu* J.A.") 85-86 (Fraser Decl. ¶ 9); 106 (Marchioro Decl. ¶ 5).[2] Section 6(b) also burdens the candidate for local office, because she is prevented from telling the electorate that she has been evaluated by a group of well-informed, interested individuals and found worthy of their support.

The Ninth Circuit correctly held that the broad principles articulated in *Eu* applied to political speech in *all* elections:

> [T]here is nothing in this court's *Eu* opinion or the Supreme Court's affirmance of that opinion which suggests that either analysis was in any way dependent upon the fact that partisan offices were at issue. The concern in both fora was with the State's abridgement of the rights of political parties and their members to exchange ideas and information, not with the nature of the elections at issue.

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[2] Amici refer in this brief to declarations in the Joint Appendix ("*Eu* J.A.") and the Addendum to Motion to Dismiss or Affirm ("*Eu* Add.") filed in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989). "[T]he Court can take judicial notice of matters appearing in the certified or printed appendices or records in the official files of the Court." Stern, Gressman & Shapiro, *Supreme Court Practice* 540 (6th ed. 1986); *see also National Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930).

Geary v. Renne, 911 F.2d 280, 284 (9th Cir. 1990) (*en banc*), *cert granted* (1991).[3] *See also Brown v. Hartlage*, 456 U.S. 45, 60 (1982). ("It is simply not the function of government to 'select which issues are worth discussing or debating in the course of a political campaign'").

B. Section 6(b) Is a Speaker- and Content-Based Restriction of Speech, and Thus Is Presumptively Invalid

In identifying a type of political speech and "silencing a particular class of speakers with regard to it," California has acted directly contrary to the holding in *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), that political speech may not be prohibited solely on the basis of the speaker or the content. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." 435 U.S. at 784-85.

The Court's intolerance of speaker-based restrictions on speech, such as section 6(b)'s prohibition against speech by political parties, is founded on the premise that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." (*Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533 (1980)) (quoting *Bellotti*, 435 U.S. at 777). Moreover, contrary to petitioners' central contention that an entity can lose its right to speak if it is given government benefits, this Court has held that a state cannot suppress the speech even of an organization upon which it has conferred a *monopoly*. An entity's receipt of government benefits "does not decrease the

[3] Petitioners' attempt to restrict the foundation for the *Eu* decision to this Court's observation that parties have the right to "communicate with [their] members concerning *[their] own decision-making process*" (*see* Petitioners' Brf. 19 (emphasis in original)) cannot be credited. *Eu* clearly spoke to the central importance of political speech and rested its holding thereon. *See Eu*, 489 U.S. at 222-23.

informative value of [that entity's] opinions on critical public matters" (*Consolidated Edison*, 447 U.S. at 534 n.1), nor does it grant the government license to silence those opinions.

Section 6(b) also offends constitutional precedent in that it suppresses speech based on its content – here, the approval or disapproval of candidates for public office and discussion of the candidates' qualifications. The Court has repeatedly subjected content-based restrictions of political expression to "the most exacting scrutiny." *Texas v. Johnson*, 109 S. Ct. 2533, 2543 (1989) (citation omitted). As Judge Canby accurately observed in dissent from the original Ninth Circuit decision, "[Section 6(b)] is directed at the *content of speech*, in order indirectly to achieve political consequences. That is its prime flaw." *Geary v. Renne*, 880 F.2d 1062, 1085 (9th Cir. 1989), *reh'g granted*, 895 F.2d 1230 (1990) (emphasis added).

C. Section 6(b) Imposes a Substantial Burden on the Associational Rights of Party Members

Eu's rationale – that any law which interferes with a political party's ability to communicate with its members about a candidate's qualifications constitutes a "particularly egregious" burden on its freedoms of speech and association (489 U.S. at 224) – applies with equal force here. *Eu* recognized that political parties are no more than individual citizens banding together to engage in political activity. Thus, by forbidding a party from evaluating candidates and communicating its endorsements to its members, section 6(b) weakens the party at the core of its institutional existence. *Eu* J.A. 125 (Prof. Burns Decl. ¶ 13.); 110-11 (Prof. Ranney Decl. ¶ 9). *See also Eu* J.A. 88 (Gingell Decl. ¶ 4); 91-92 (Hudson Decl. ¶ 5); 101 (Prof. Lee Decl. ¶ 9); 120 (Bone Decl. ¶ 7). Because voters join parties precisely so that they may amplify their political voices through association (*see Eu* J.A. 80 (Fay Decl. ¶ 2); 115 (Sturrock Decl. ¶ 8)), section 6(b) dramatically impinges on First Amendment rights by diminishing the incentive to associate.

To justify burdening the associational rights of party members, petitioners advance a dangerous argument that this case concerns "political power" and the need to contain it. Petitioners' Brf. 7.[4] If parties, through their speech, wield "political power," this fact cannot constitutionally be of concern to California. "[S]peech cannot be prohibited on the ground that it is effective." *Geary*, 911 F.2d at 289 (Reinhardt, J. and Kozinski, J., concurring ("concurrence")). *See also Bellotti*, 435 U.S. at 790 ("The Constitution 'protects expression which is eloquent no less than that which is unconvincing'") (citation omitted). The issue, then, is not "political power," but whether political parties may be silenced. The answer, as indicated by *Eu*, is emphatically "No."[5]

Underlying petitioners' argument is the unspoken premise that political parties are engines of evil. Petitioners ignore the crucial function that political parties serve in our democracy:

> Political parties are an essential element of a strong democracy. The need for political parties is evidenced by their existence in every democracy in the world. A political party is the only organization large enough, open enough, and public enough to give order and direction to a democracy's political life.

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[4] Even if petitioners' concern were legitimate, colorful stories about corruption at the turn of the century, based largely on an archaic view of party structure, have no bearing on the operation of California's political parties in the 1990s. Contrary to the "party boss" image, to which the Proposition 49 ballot refers seven times, today's county central committees are elected by the voters and hold open meetings. *Eu* Add. 4a (Christman Decl. ¶ 8).

[5] Petitioners also ignore the fact that, by suppressing the speech of and thereby weakening political parties, section 6(b) necessarily increases the "political power" of individual politicians, political clubs, political action committees, special interest groups, and for-profit slate card vendors, all of whom remain free to influence, through speech and contributions, nonpartisan elections. *See Geary*, 911 F.2d at 292 (concurrence).

Eu J.A. 110 (Prof. Ranney Decl. ¶ 6).[6]

II. SECTION 6(B) DOES NOT SERVE PETITIONERS' ASSERTED STATE INTERESTS

Accepting *arguendo* petitioners' asserted interests in maintaining both the impartial administration of government and the appearance thereof, petitioners still must show that section 6(b) is necessary to serve those interests. Petitioners have not made and cannot make that showing.

A. Petitioners Can Point to No Evidence Linking Political Party Endorsements to Corruption, the Loss of Impartial Government, or Any Other Evil

Petitioners warn that a variety of ills will befall California if political parties are permitted to endorse nonpartisan candidates, including party domination of local offices, the undermining of impartial government and of judicial independence, and closure of the electoral field to candidates who "will not toe the party line." *See* Petitioners' Brf. 7. To support their dire predictions, petitioners cite several declarations (*see* J.A. 27-37), filed after the District Court's entry of summary judgment. *See Geary*, 911 F.2d at 305 n.41 (Rymer, J., dissenting). These declarations, as the Ninth Circuit found, are singularly unpersuasive, leaving the record devoid of support for petitioners' grim forecasts:

> We therefore reject appellants' assertion that allowing party endorsements will lead inexorably to party usurpation of the nomination process for nonpartisan candidates; the seventy years of nonpartisan government celebrated by appellants were achieved without benefit of a formal ban on partisan advocacy,

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[6] Petitioners' depiction of parties similarly disregards the "many essential functions" that parties serve in our democracy, such as developing political programs and ideas, and increasing voter awareness and participation. *Eu* J.A. 101 (Prof. Lee Decl. ¶ 8); 110 (Prof. Ranney Decl. ¶¶ 6-8).

> and the *State has offered nothing but speculative evidence to support its contention that the invalidation of § 6(b) will generate a disastrous departure from the experience of the past.*

Geary, 911 F.2d at 285-86 (emphasis added).[7] The concurring opinion, in even stronger language, also remarked on this absence of supporting evidence:

> I note that nowhere in the record is there a whit of evidence that party endorsements in nonpartisan

[7] While Petitioners concede that there have been no party machine politics in California since 1910, they insist that this state of affairs arises because parties have not endorsed in nonpartisan elections. Petitioners' Brf. 28. Their argument is plainly wrong: the California Supreme Court found that partisan endorsements in nonpartisan races have been "customary" in California (*Unger v. Superior Court*, 37 Cal. 3d 612, 616, 692 P.2d 238 (1984) ("*Unger II*")), meaning that partisan endorsements and nonpartisan elections have co-existed with no resulting corruption or decline in confidence. Petitioners' attempt to discredit this holding of the California Supreme Court (*see* Petitioners' Brf. 26-28) must be rejected.

In reaching this conclusion, the *Unger II* court relied on amici Professor Eugene C. Lee's study, a California Attorney General Opinion, and the declarations filed in *Unger v. Superior Court*, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980) ("*Unger I*"), in which the chairs of the party central committees testified that "their committees had endorsed and/or supported candidates for judicial and other nonpartisan office for many years." 37 Cal. 3d at 616 n.6. The *Unger I* court, in addition to noting that such endorsements were widespread, specifically found that "the practice is widespread in the San Francisco Bay Area." 102 Cal. App. 3d at 684 (footnote omitted).

Lee's study supports the *Unger I* and *Unger II* findings that partisan endorsements have been commonplace in nonpartisan elections. Lee found that such endorsements occurred more frequently in California's populous urban areas than in the sparsely populated rural areas. Lee, *The Politics of Nonpartisanship* (1960) at 102-03. This fact renders petitioners' citation to the *number* of cities which endorsed misleading. *See also* R. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?* 2 Journal of Law and Politics 57, 69 (1985) ("Slate mailers in the past were sent out by the parties until a 1980 California Court of Appeal decision barred party involvement in nonpartisan races").

> elections ever, even on a single occasion, led to corruption or evil of any kind – almost eighty years of endorsements in nonpartisan races and not one example of a public official being unduly or improperly influenced.

Id. at 289 (concurrence). *See also id.* at 286 n.5 (no evidence that political parties have significantly influenced nonpartisan elections or threatened public confidence in officeholders). Accordingly, this Court should attach no evidentiary weight to petitioners' declarations. *See New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 702-03 (1989) (Since the courts below are better situated to assess the weight of competing arguments, Court deferred to findings of lower courts that "proffered governmental interests were either invalid or were not sufficient to justify [the infringement of constitutional rights]").

What the evidence does indicate, however, is that California appears to be the *only* state to ban political party endorsements in nonpartisan local elections, and one of only three states to ban endorsements in judicial elections. *See Geary*, 880 F.2d at 1069 n.12; Petitioners' Brf. 10 n.5.[8] The fact that California's endorsement ban is not found in the overwhelming majority of states casts grave doubt on "the weight to be assigned [California's] asserted interests and the extent to which the prohibition in question is necessary to further them." *Butterworth v. Smith*, 110 S. Ct. 1376, 1383 (1990) (constitutionality of Florida law banning grand jury witnesses from disclosing testimony to public). *See also Eu*, 489 U.S. at 226 ("Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary").

[8] Petitioners incorrectly include Florida as a state with a ban on party endorsement in judicial elections. Florida's judicial endorsement ban has been enjoined since the decision in *Concerned Democrats v. Reno*, 458 F. Supp. 60 (S.D. Fla. 1978), in which the court found the ban unconstitutional.

B. A Ban on What the Electorate Can Hear Does Not Serve Petitioners' Asserted Interests in Maintaining the Appearance of Impartiality and Public Confidence in Officeholders and Judges

Petitioners and amicus California Judges Association (the "CJA") advance related interests in the "appearance of impartial justice" (Petitioners' Brf. 14) and in "promoting public confidence in the impartiality" of judges. CJA Brf. 4. Indeed, these interests are the entire focus of the CJA's brief.

The premise underlying petitioners' and the CJA's argument is that information – here, the views of the political parties regarding officeholders' qualifications – must be *withheld* from the electorate because, otherwise, some voters may suspect that parties exact *quid pro quo* arrangements in exchange for their endorsements. This suspicion, following petitioners' argument, will undermine the "appearance of impartial justice" and public confidence in local government.

Petitioners and the CJA overlook applicable First Amendment precedent. A state's strong interest in maintaining the integrity, professionalism, or dignity of a group or profession cannot justify the suppression of speech, even where that speech may undermine the public's perception of the profession. *Boos v. Barry*, 485 U.S. 312, 321-29 (1988); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368-71, (1977); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 766-73 (1976).

Petitioners' asserted interest in the appearance of impartiality and maintaining public confidence in local officeholders is virtually indistinguishable from the asserted interests in maintaining the integrity, professionalism, or dignity of a profession. Local officeholders are no more entitled than pharmacists, lawyers, or foreign diplomats to be insulated from the effects of the free flow of information. Similarly, keeping the electorate in ignorance about the qualifications of local officeholders is no more acceptable, as a constitutional matter, than was keeping consumers in

ignorance in *Bates* or *Virginia Bd. of Pharmacy*. Indeed, since local government so vitally affects the lives of our citizenry, a ban on discussion of local officeholders' qualifications is more pernicious than the bans struck down in *Boos*, *Bates*, and *Virginia Bd. of Pharmacy*.[9]

Where the choice is between more or less information, the First Amendment counsels us to opt for more:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia Bd. of Pharmacy, 425 U.S. at 770. Expanding the debate over political candidates' qualifications can lead only to a more informed voter choice and to increased officeholder accountability.

Finally, contrary to petitioners' implicit assumption, the fact that nonpartisan officeholders in the future might listen to the views of political party organizations *does not* signal either corruption or an undermining of impartial government. Officeholders should be responsive to the views of all voters, *including* the voters who organize themselves into party organizations.[10] *See Geary*, 911 F.2d at 286 n.5. In a

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[9] Petitioners argue that parties need have no voice in local elections because local government does nothing more than "issue the building permits, fix the potholes and install the 'Slow – Children At Play' signs in front of schools." Petitioners' Brf. 16. Far from performing merely ministerial tasks, however, local government decides such policy issues as taxes, school desegregation plans, slow growth initiatives and rent control. Even in providing municipal services, limited resources can require that local governments make politically charged decisions regarding both the level of services to be provided and the distribution thereof.

[10] Even assuming that removing party labels from nonpartisan candidates serves the appearance of impartiality, section 6(b) does not achieve that purpose. Hundreds of political clubs which incorporate the

democracy, it is up to the *voter* to determine what weight to give endorsements:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.

Bellotti, 435 U.S. at 791-92. "The argument that political party electioneering corrupts nonpartisan election systems is just a variation on the paternalistic claim that people should not vote based on party affiliation." Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677, 1695 (1987).

C. Petitioners' Reliance on *Letter Carriers* Is Misplaced

Petitioners attempt to analogize this case to *Civil Service Comm. v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), and argue that because *Letter Carriers* recognized an interest in impartial administration of government and section 6(b) supposedly serves that same interest, section 6(b) should be

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names of major parties would remain free to endorse nonpartisan candidates. *See Eu*, 489 U.S. at 217 n.3; *Eu* J.A. 114 (Sturrock Decl. ¶ 6). Moreover, section 6(b) does not affect "for-profit" vendors which sell space on slate mailers and lead the public to believe that the cards represent official party endorsements by prominently displaying the name and symbol of the Democratic or Republican party, including only a small print disclaimer. *See Geary*, 911 F.2d at 294 (concurrence). These mailers appear to relay information about a candidate's politics; in reality the publisher sells slots on the mailer to the highest bidder:

> [W]hen [a] campaign manager refused to pay a second $15,000 – offering instead only $5,000 – his opponent got the slot for $12,000. One judicial candidate who was not slated by Californians for Democratic Representation commented bitterly that, "There was a bidding war, and I lost, even though I'm a Democrat and he's a registered Republican. You can't believe what an industry this has become . . . and for the candidates, it's blackmail."

Schotland, *supra* p. 11, at 70-71 (citation omitted).

upheld. Petitioners' Brf. 17-19. For several reasons, petitioners' syllogism is fatally flawed.

First, petitioners ignore this Court's statement in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), that the Hatch Act restrictions would have been unconstitutional had they been directed at private citizens. *Broadrick*, the companion case to *Letter Carriers*, struck down Oklahoma's "state Hatch Act," noting that "[the statute] is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments." 413 U.S. at 616. *Letter Carriers* itself noted that the government's interest in regulating the speech of government employees "differ[s] significantly" from its interest in regulating the speech of private citizens. *Id.* at 564 (citation omitted). *See also McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646 n.6 (1976).

Second, petitioners fail to recognize that the Court decided *Letter Carriers* under a rational basis standard, *not* a compelling interest standard.[11] Petitioners therefore err when they rely upon that case in urging this Court to disregard the adequacy of less restrictive alternatives.

Third, this Court has *rejected* the argument that an interest in impartial government justifies a ban on endorsements. *See Buckley*, 424 U.S. at 27 n.29. In *Buckley*, the government argued that *Letter Carriers* supported a federal restriction on independent campaign expenditures during candidate elections. This Court termed the government's reliance on *Letter Carriers* mistaken, holding that *Letter Carriers* specifically preserved the right of persons to express their opinions publicly during candidate elections:

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[11] The Court has treated *Letter Carriers* as a case in which it upheld, on rational basis review, regulations directed only at government employees. *See Harrah Indep. School Dist. v. Martin*, 440 U.S. 194, 198 (1979) (citing *Letter Carriers* in holding that the regulation at issue would be upheld unless there was "no rational connection" between the regulation and the interest proffered).

> [*The Letter Carriers*] Court repeatedly emphasized the statutory provision and corresponding regulation *permitting an employee to "[e]xpress his opinion* as an individual privately and *publicly on political* subjects and *candidates*." . . . [The *Letter Carriers* Court] carefully declined to endorse provisions threatening political expression.

Buckley, 424 U.S. at 48 n.54 (emphasis added) (citations omitted).

Fourth, the Hatch Act differs dramatically from section 6(b), in that the Hatch Act *furthered* First Amendment interests by preserving government employees' freedoms of association and belief. At the time *Letter Carriers* was decided, a newly elected government official could discharge nonpolicymaking employees based on their partisan affiliation. Government employees thus had much to fear regarding their political affiliation being divulged. *See Broadrick*, 413 U.S. at 606 (Hatch Act restrictions "insur[e] [employee] job security, free from the vicissitudes of the elective process, and [protect] them from 'political extortion'" (citation omitted)). Thus, the Hatch Act was viewed as an attempt to further First Amendment interests:

> [I]n [*Letter Carriers*] it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association. *Subordination of some First Amendment activity was permissible to protect other such activity.*

Elrod v. Burns, 427 U.S. 347, 371 (1976) (emphasis added) (footnote omitted). By contrast, section 6(b) imposes a total ban on the political parties' First Amendment activity, without counterbalancing that incursion by any First Amendment "protective" benefits.

III. PETITIONERS' ASSERTED INTEREST IN ENSURING THAT CALIFORNIA'S POLITICAL PARTIES DO NOT "DISPROPORTIONATELY INFLUENCE" NONPARTISAN ELECTIONS BY COMMUNICATING THEIR VIEWS TO THE ELECTORATE IS INVALID

In their discussion of underinclusiveness, petitioners appear to advance another asserted state interest: "counterbalancing, in the nonpartisan context, . . . [state-conferred] political advantages." Petitioners' Brf. 23. To support this argument, petitioners rely exclusively on *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990), where the Court upheld a restriction on corporate expenditures for political purposes. As shown below, petitioners' reliance is thrice flawed.

A. A State Has No Interest in Restricting the First Amendment Activities of Voluntary Political Associations

FEC v. Massachusetts Citizens for Life ("*MCFL*"), 479 U.S. 238 (1986), forecloses petitioners' argument that state-conferred advantages justify first amendment restrictions on political parties. In *MCFL*, this Court considered the constitutionality of a law requiring corporations to use segregated funds when spending money on behalf of candidates. 479 U.S. at 241. *MCFL* held that such a restriction could not be applied to corporations that were *voluntary political associations*, despite the fact that such organizations obviously received substantial state-conferred advantages. *Id.* at 259-63.

MCFL and *Austin* both teach that when a *commercial* organization, through largesse, gains power unrelated to its political popularity, the potential for corruption exists. Political parties do not give rise to the corruption concern of *Austin* precisely because the parties' political power, like that of Massachusetts Citizens For Life, derives directly from their political popularity. A *political* organization does not unfairly exploit its influence when it exercises political power, even if that power derives in part from state-conferred advantages:

> "[Certain groups] do not pose [any] danger of *corruption*. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." *That description applies equally well to the political parties targeted by § 6(b).*

Geary, 911 F.2d at 284 (emphasis added) (quoting, with emphasis added, *MCFL*, 479 U.S. at 259).

B. Petitioners Have No Legal Support for the Proposition That "State-Conferred Advantages" Justify Section 6(b)'s Foreclosure of Speech

Petitioners can point to no case holding that state-conferred advantages justify the complete ban on political speech imposed by section 6(b).[12] Petitioners' reliance on *Austin* is expecially anomalous in that *Austin* itself based its holding in part on the fact that the Michigan statute still left open avenues for speech. 110 S. Ct. at 1402 (Brennan, J., concurring) ("The Michigan law at issue is not an across-the-board prohibition on political participation by corporations or even a complete ban on corporate political expenditures"). In contrast to *Austin*, this case concerns whether the state can stop the power of an *idea*, rather than the power of *money*.

C. Petitioners Can Prove No Nexus Between the "State-Conferred Advantages" and the Political Parties' "Power"

Petitioners assert that "[t]he influence and popular support of a California political party are *directly related to its state conferred benefits*." Petitioners' Brf. 25 (emphasis added).

[12] The statute at issue in *Austin* was termed "the most severe restriction on political speech ever sanctioned by this Court" (*Austin*, 110 S. Ct. at 1425-26 (Kennedy, J., dissenting)), yet section 6(b), which flatly prohibits political speech by political parties, constitutes a far greater burden on First Amendment rights than did the *Austin* statute.

However, since all parties receive the same benefits, and since, for example, the California Democratic Party and the California Peace and Freedom Party have grossly disparate influence, it is apparent that the parties' respective influence is attributable to their popularity with voters and not to their receipt of state-conferred benefits. Speech bans are inappropriate if they encompass organizations whose resources are due largely to sources other than government benefits. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (striking down an FCC regulation under which "[a] station that receives only 1% of its overall income from [the government] is barred absolutely from all editorializing").

Indeed, one of petitioners' own declarations – that of Proposition 49 author Richard Mountjoy – attributes the political parties' influence to the parties' diverse memberships and broad agendas, and *not* to their receiving "state conferred advantages."

> Parties are unique. Their power base is much broader than unofficial organizations and special interest groups, and not single issue oriented. An endorsement by a party would have a much greater impact on voters than would the Sierra Club, for example, but would be less informative as to where the candidate stands on local issues.

J.A. 36 (Mountjoy Decl. ¶ 7).

One of the statutes cited by petitioners as a "state conferred advantage" actually *disproves* petitioners' arguments. California Revenue & Taxation Code section 18701 *et seq.* provides that the state of California can collect contributions for the political parties in connection with the state personal income tax returns. Yet section 18702, which articulates the legislative purpose of this provision, indicates that the statute is necessary to rectify the imbalance between political parties and better-financed wealthy individuals and special interest groups:

> The Legislature finds and declares:
>
> (a) Candidates are now frequently dependent on large contributions from *wealthy individuals and interest groups* for campaign financing. Individuals and interest groups who make large contributions thus may *enjoy disproportionate access* to public officials and influence in government decisionmaking. . . .
>
> (b) *This act seeks to reduce candidate dependence* on large contributions and the excessive influence of large contributors, *by providing qualified political parties* with a campaign fund based on small contributions, which fund shall be used to assist candidates under the direction of the state parties and certain of their elected representatives.

Cal. Rev. & Tax. Code § 18702 (emphasis added). It is ironic that petitioners argue that this section, enacted only eight years ago, is "directly" responsible for what petitioners characterize as the threatening influence of the political parties today.

IV. THE GUARANTEE CLAUSE DOES NOT PERMIT CALIFORNIA TO INFRINGE THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND THEIR ADHERENTS

Petitioners argue in passing that section 6(b) relates to the structure of California's local government, thus implicating interests of federalism and the U.S. Constitution's guarantee of a republican form of government (the "Guarantee Clause"). Petitioners then assert that the Court should balance these federalism interests against the political parties' First Amendment freedoms. Petitioners' Brf. 10-11. Even a cursory review of precedent, however, demonstrates that petitioners' position lacks any merit.[13]

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[13] Petitioners' invocation of the Guarantee Clause is questionable given the uncertainty over whether the Guarantee Clause grants *any* powers to the states. It has long been held that it is *Congress'* province to enforce the guarantee of a republican government. *See, e.g., Luther v. Borden*, 7 How. 1, 42-44 (1849); *see also Baker v. Carr*, 369 U.S. 186, 223-24 (1962) (discussing cases in which the Court has "refused to resort to the Guaranty clause . . . as the source of a constitutional standard for invalidating state action"). Petitioners' brief conspicuously lacks any citation to case law in which a state law challenged on constitutional grounds has been upheld pursuant to the Guarantee Clause.

First, section 6(b) does not directly promote or protect the interests underlying the Guarantee Clause and general federalism principles. Petitioners correctly assert that the states have the "power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J.). Section 6(b), however, does not concern the nature of California's electoral "machinery" or the structure of local government; rather, section 6(b) dictates who may speak during California's elections. But "the people of California may not suppress free speech on the excuse that they are merely determining the method by which candidates will be elected." *Geary*, 911 F.2d at 287 (concurrence). Adding the voices of the political parties to the public debate does not alter the nonpartisan structure of California's local elections: for example, the candidates are not pre-selected in party primaries, they do not run under any party label, and ballots do not identify their party affiliation.[14]

Second, section 6(b) trespasses on the fundamental rights of the political parties and their adherents. Even those cases which recognize a state's right to determine its own form of government forbid such infringement. This Court has consistently struck down state structural choices which violate constitutional rights of that state's citizens. *See Morris*,

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[14] Petitioners have retreated from the position urged in their petition for writ of certiorari and in Judge Rymer's dissent from the *en banc* decision that the "constitutional origin of California's interest in the nonpartisan structure of local government renders that interest compelling *per se*." Pet. for Writ Cert. 6-7. A state's interest is not compelling merely because the state acts pursuant to an explicit constitutional grant of power. *See Eu*, 489 U.S. at 222; *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986).

489 U.S. 688 (1989); *Reynolds v. Sims*, 377 U.S. 533 (1964). Petitioners cite no authority holding to the contrary. Indeed, the first case petitioners cite, *Oregon v. Mitchell*, explicitly holds that a state's electoral machinery must be "within the limits of the Constitution." 400 U.S. at 125.

V. SECTION 6(b) IS NOT NARROWLY TAILORED TO PROMOTE PETITIONERS' ASSERTED INTEREST IN THE IMPARTIAL ADMINISTRATION OF GOVERNMENT

Because section 6(b) affects political expression and participation, it must be narrowly drawn to avoid unnecessary restrictions of constitutionally protected freedoms. *Eu*, 489 U.S. at 221-22; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Kusper*, 414 U.S. at 59. Section 6(b)'s complete ban on speech is not the least restrictive means for promoting the State's asserted interest in the impartial administration of government and therefore must be struck down.[15]

A. Less Restrictive Alternatives Are Available

As found by the District Court and affirmed by the Ninth Circuit, petitioners have made no showing, apart from discredited speculation, that their asserted interest in the impartial administration of government could not be served by alternatives less drastic than section 6(b)'s draconian ban on "core" political speech. *See Geary*, 911 F.2d at 294-95 (concurrence) (suggesting less drastic means to assure an impartial judiciary).

Conceding that they have no "definitive evidence" of harm flowing from political party endorsements, petitioners state

[15] The fact that petitioners measure section 6(b) not against their asserted interest in impartial government but rather against "nonpartisanship," undermines their entire discussion of the "narrowly tailored" requirement. Nonpartisanship *qua* nonpartisanship is *not* an end in itself; it is merely one vehicle for electing officials.

that they need not make a "particularized showing of actual harms," and can rely on the voters' "reasonable belief" in the necessity of the restriction. Petitioners' Brf. 29. This Court recently rejected a similar argument: that the government can justify a speech ban based solely on a belief in its necessity. In *Sable Communications v. FCC*, 109 S. Ct. 2829 (1989), the FCC defended a ban on indecent phone messages as necessary to prevent children from hearing such messages. 109 S. Ct. at 2837. Yet the FCC neither tested alternatives to a speech ban, nor presented the Court with evidence that such a ban was necessary. *Id.* at 2837-38. Instead, the FCC urged the Court to rely upon Congress' unsubstantiated conclusion that nothing short of a complete ban would be effective. *Id.* The Court rejected the invitation. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* at 2838 (citation omitted).[16]

B. Section 6(b)'s Targeting of Political Parties Is Fatally Underinclusive

Section 6(b), by targeting the speech of political parties for suppression, is invalid for underinclusiveness. If endorsements by political parties pose a threat to impartial government, then endorsements by countless political clubs, political action committees, special interest and pressure groups, politicians, labor unions, newspapers and for-profit slate mailer vendors pose an equal – indeed, a far greater – threat. Many of these entities, as well as powerful individual politicians, are able to raise far more funds than California's official political parties, which the Ninth Circuit has described as "weak and fossilized." *San Francisco Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 833 (9th Cir. 1987), *aff'd*, 489 U.S. 214

[16] The cases cited by petitioners in support of the proposition that they need supply no evidence that section 6(b) is necessary (Petitioners' Brf. 29) did not apply strict scrutiny and thus are inapposite to whether such evidence is required here. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (Court, in upholding obscenity statute, noted that it is improper to scrutinize legislative findings "save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution").

(1989). *See also Eu* J.A. at 101 (Prof. Lee Decl. ¶ 10) ("California political parties are weak organizations"). It makes no sense to suppress the speech of political parties – which have a more diverse membership and which are more accountable than the other groups listed above – while simultaneously permitting all other entities and individuals to endorse candidates in nonpartisan elections. *See Eu*, 489 U.S. at 228 n.18 ("There is no evidence that an endorsement issued by [a party] carries more weight than one issued by a newspaper or labor union"). This distinction renders section 6(b) fatally underinclusive:

> The fact is that suppressing the views of political parties leaves the field free to special interest groups that have narrow, often single-issue agendas they wish to advance through the courts. California's endorsement ban permits those groups to promote their chosen candidates without fear of countervailing messages from broader-based political parties which tend to take a more balanced view, and which consider candidates' overall records, qualifications, and . . . philosophy.

Geary, 911 F.2d at 292-93 (concurrence).

In sum, section 6(b) exclusively targets political parties and turns a blind eye to the myriad special interest groups and politicians who issue endorsements in nonpartisan elections. This distinction without a difference renders section 6(b) fatally underinclusive.[17] *See Florida Star v. B.J.F.*, 109 S. Ct. 2603, 2612 (1989).

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[17] Petitioners contend that the underinclusiveness of section 6(b) can be justified because "there is no history of bossism or domination of local government by nonpartisan organizations in California." Petitioners' Brf. 22. Petitioners' assertion represents a conveniently selective view of history. Judge Trott in the original panel decision devoted considerable attention to the "pernicious activity" of the Southern Pacific Railroad. *Geary*, 880 F.2d at 1073. In the *en banc* decision, the concurrence commented upon the anomaly of a "progressive reform" which left the Southern Pacific untouched, a fact which "not only compelled candidates to deal directly with the Southern Pacific and its lobbyists, but made them more dependent on the railroad's contributions." *Geary*, 911 F.2d at 287 (concurrence).

VI. THE ASSERTED INTEREST IN PRESERVING THE IMPARTIALITY OF THE JUDICIARY DOES NOT JUSTIFY SECTION 6(b)'S SUPPRESSION OF SPEECH

Petitioners argue that section 6(b) is necessary to preserve the impartiality of California's judiciary and the appearance of impartial justice. Petitioners' Brf. 13-14. Petitioners misconceive the source of the threat to an impartial judiciary, if indeed such a threat exists. Petitioners also ignore prior rulings of this Court that reject petitioners' asserted interest as inadequate to justify the suppression of political speech.

It is California's decision to elect its judges and thereby to subject its judges to the political process – and *not* the speech concerning those elections – that potentially undermines the interest in judicial independence. *See Geary*, 911 F.2d at 290 (concurrence).[18] California undeniably is free to strike its desired balance between the separate and distinct goals of judicial independence and judicial accountability (*Geary*, 911 F.2d at 294-95 (concurrence)), but, once having done so, must abide by the foreseeable consequences of that trade-off. "The State of California cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate." *Geary*, 911 F.2d at 294 (concurrence).[19]

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[18] Interestingly, both reports relied on by amicus CJA to show "partisan evils" in other states' judiciaries conclude not that parties should be silenced, but that judicial elections should be eliminated. Special Commission on the Administration of Justice in Cook County, *A Report on Judicial Selection* Appendix B (1985); State of New York Commission on Government Integrity, *Becoming a Judge: Report on the Failings of Judicial Elections in New York State* 46 (1988).

[19] The California Court of Appeal recently endorsed precisely this point: "Once it is agreed that judges are subject to the electoral process, the electorate should arguably be given as much information as possible upon which to base its vote." *Clark v. Burleigh*, No. H007141, 1991 Cal. App. LEXIS 301, p.18 (6th App. Dist. Mar. 28, 1991) (striking down as violative of the First Amendment California Elections Code Section 10012.1, which

Petitioners also ignore the logical inconsistency inherent in their position:

> [I]t cannot be seriously argued . . . *both* that the typical judge is strong enough to ignore the temptation to succumb to the influence of those who can truly control his destiny – the powerful interests, the big contributors, even the governor who has it solely within his power to make a career advancement possible – *and* at the same time, that the typical judge is so weak, morally or ethically, that he will not be willing to disagree in subsequent judicial opinions with so much as a single plank of the platform of a political party that has given him nothing more than its endorsement. That argument simply does not make sense.

Geary, 911 F.2d at 290-91 (concurrence) (emphasis in original) (footnote omitted).[20] It is plainly irrational to argue that the cash-rich special interest groups which were so visible during the 1986 California Supreme Court retention election do not undermine the independence of the judiciary while the endorsements of amici political parties – which played no role in this election – most certainly will.[21] Indeed, eliminating

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First Amendment California Elections Code Section 10012.1, which prohibited judicial candidates from referring to other judicial candidates' qualifications in the voter's pamphlet).

[20] The CJA also fails to justify section 6(b)'s targeting of political parties. The CJA argues that special interest group activity does not threaten judicial independence "[a]s long as contributions are limited, and judges disqualify themselves in appropriate cases involving campaign contributors or opponents." CJA Brf. 15-16. Amici submit that this argument is absurd. A judge endorsed by the National Abortion Rights Advocates is not required to disqualify him- or herself in an abortion case. Yet, understandably, the National Right to Life movement – to paraphrase the CJA brief – "may have reason to doubt whether a court elected as a '[pro-choice] Supreme Court' will treat them impartially." CJA Brf. 12 n.9.

[21] In 1986, numerous special interest groups campaigned for the rejection of Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso, including Crime Victims for Court Reform, State Senator H.

political party endorsements in judicial races will only *increase* candidates' dependence upon large contributions and allow single issue interest groups to define the election agenda. *Id.*

In addition to their logical infirmities, petitioners' arguments about the impartiality interest ignore decisions of this Court holding like interests insufficient to justify the repression of political speech. For example, the Court has held that the state cannot suppress political speech about an election under the guise of preserving the integrity of the election. *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (striking down Colorado statute that prohibited paying to have initiative petitions circulated; state had argued that ban was necessary to protect integrity of the initiative process).

Petitioners also ignore this Court's prior ruling concerning the breadth of First Amendment protection for public commentary not only on the performance of judges, but even on the rulings of judges.[22] *See Bridges v. California*, 314 U.S. 252 (1941). In *Bridges*, the trial court held the Los Angeles Times in contempt for publishing editorials concerning judicial cases which had not been finally determined, on the ground that the editorials might influence the lower court's decision.[23] *See*

L. Richardson's Law and Order Committee, and the Pro Life Council. Culver and Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 Judicature 81, 87-88 (1986). The opposition to the three justices raised approximately seven million dollars. Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 368 (1986).

[22] The CJA, in an effort to place a more favorable gloss on section 6(b), urges this Court to view that section more as a ban on *monetary support* than a ban on *speech*. *See* CJA Brf. at 7-8. However, it is axiomatic that if a statute bans all First Amendment activity, a court should not evaluate that statute's validity by looking at its effect on the least protected activity proscribed. *See Houston v. Hill*, 482 U.S. 451, 461-67 (1987).

[23] The weakness of the CJA's position is manifested by its citation of the "variety of contexts" in which the Court has invoked the interest of judicial impartiality. CJA Brf. 3. Notably, in none of the cases cited by the CJA did

id. at 259, 273 n.18. The trial judge reasoned that the editorials "tend[ed] to interfere with the fair and orderly administration of justice in a pending case," and that the First Amendment was subordinated to "the public interest in judicial impartiality and decorum." *Id*. at 259.

Bridges rejected the view that judges would be influenced by the desire to gain support or avoid opposition:

> To regard [a threat of future adverse criticism], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor – which we cannot accept as a major premise.

Id. at 273. *Bridges* also rejected the argument that the public needs to be shielded from public commentary concerning judges in order to preserve respect for the judiciary:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion for it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Id. at 270-71. *See also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838-39 (1978) (upholding a newspaper's right to report on judicial disciplinary proceedings, because "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern" and because the judiciary had "no greater immunity from criticism than other persons or institutions"). By analogy, the state here may not infringe core

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the Court uphold the abridgement of an individual right, and, *a fortiori*, none so precious as the right to engage in political speech.

First Amendment rights on the speculative assertion that the political parties' speech will cause judges to be less than fair and impartial or will lessen the appearance of impartiality.

If petitioners fear the potential of *quid pro quo* arrangements between judicial candidates and political parties, the constitutionally permissible solution is to forbid *that conduct*, not to suppress speech. *See* McFadden, *Electing Justice: The Law and Ethics of Judicial Election Campaigns*, 98 (1990) ("[Judicial] candidates are prohibited from promising a quid pro quo for the endorsements they solicit. . . . [A] number of judges have been reprimanded, and others removed from office, for behavior of this kind"). California is free "to require whatever professional standards it wishes" of its judges, but it may not "keep[] the public in ignorance" of constitutionally protected speech. *Virginia Pharmacy Bd.*, 425 U.S. at 770.

In short, section 6(b) is a misguided means of addressing judicial impartiality. Petitioners' real complaint is that judges and other nonpartisan officials are subject to the electoral marketplace and its associated pressures. Section 6(b) impermissibly penalizes amici political parties and the public without addressing petitioners' underlying concern.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Dated: April 3, 1991

Respectfully submitted,

CEDRIC C. CHAO
MONIQUE VAN YZERLOOY
GREGORY R. NEVINS
JON S. TIGAR
MORRISON & FOERSTER

By Cedric C. Chao
Counsel of Record

Attorneys for Amici Curiae